Supreme Court, U.S.
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No. 96-38

In The

Supreme Court of the United States

October Term, 1995

JOHN L. DEAN,

Petitioner,

vs.

TRANS WORLD AIRLINES, INC. AND
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

When the Ninth Circuit (ruling on an open issue of law in the circuit and as to which there is some disagreement between the circuits) reversed the dismissal of TWA as an impermissible "continuation" under the bankruptcy automatic stay, did the Ninth Circuit thereby lose jurisdiction to affirm other portions of the judgments before it which related solely to another party and to the withdrawal of Petitioner's attorneys, none of whom were a "debtor"?

PARTIES TO THE PROCEEDINGS

Respondent Trans World Airlines, Inc. has no parent, subsidiary or affiliate that has issued stock to the public.

The other named Respondent is Air Line Pilots Association International, a labor union.

The Petitioner is John L. Dean, an individual.

The two attorneys formerly representing the Petitioner who were permitted to withdraw are: Jocelyn J. Lyman (then of Olympia, Washington) and Raymond J. LaJeunesse, Jr. (then of Washington, D.C.).

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BRIEF IN OPPOSITION

Respondent Trans World Airlines, Inc. ("TWA") respectfully requests the Court to deny the Petition for Writ of Certiorari. TWA would concur in the letter filed by Respondent Air Line Pilots Association, Int'l ("ALPA") but files this brief as a result of the admonition in Supreme Court Rule 15.2:

> . . . In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bear on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition . . .

OPINIONS BELOW

The opinion as to which review is sought is reported at *John L. Dean v. TWA and ALPA*, 72 F.3d 754 (9th Cir. 1995) ("*Dean III*") (A1-A9 of Appendix to Petition)

This same case had previously been before the Ninth Circuit on two occasions and those opinions are at 924 F.2d 805 (9th Cir 1991)("*Dean II*") and 708 F.2d 486 (9th Cir. 1983), *cert. denied*, 464 U.S. 995 ("*Dean I*").

JURISDICTION

The judgment of the Ninth Circuit was entered December 19, 1995. Under FRAP 40(a) a Petition for Rehearing to be timely had to be filed "within 14 days after entry of judgment." On the fourteenth day after entry of judgment Petitioner ("Dean") *mailed* a petition for rehearing to the clerk of the Ninth Circuit. That petition for rehearing was denied January 31, 1996. Dean initially filed a Petition for Writ of Certiorari by mail on April 26, 1996, which did not comply with this Court's Rule 33.1. By letter dated May 2, 1996, the Clerk gave Dean 60 days in which to file a complying Petition. Dean refiled his Petition by mail on June 28, 1996.

Assuming Dean's Petition for Rehearing was timely filed, this Court would have jurisdiction pursuant to 28 U.S.C. § 2101(c).

STATEMENT OF THE CASE

The collective bargaining agreement between TWA and ALPA contained an agency shop clause, which was applicable to Dean and which required Dean, as a condition of continued employment, to pay a service charge to ALPA.

As became known to TWA only during the course of this litigation, Dean had a dispute with ALPA concerning the amount of the service charge. At the time, however, as Dean's own testimony at trial established, Dean did everything he could to keep the existence of this dispute from TWA, and was successful in doing so. On July 29,

1977, TWA received proper certification from ALPA under the collective bargaining agreement, certifying that Dean was delinquent in his service charges and requesting his discharge in accordance with that collective bargaining agreement. TWA then followed the collective bargaining procedures, which resulted in Dean's discharge on August 12, 1977.

Dean has not disputed that he, as a result of his dispute with ALPA (undisclosed to TWA), had unilaterally decided to simply reduce his payment to $10.00 per month, without seeking either an administrative or judicial resolution of his dispute with ALPA.

Dean then commenced this action in 1978. In 1982, the district court entered a partial summary judgment directing TWA to reinstate Dean. This partial summary judgment was subsequently reversed by the Ninth Circuit in *Dean I*, where that court stated:

> If courts cannot enjoin the collection of union dues, then certainly an individual should not be permitted unilaterally to decide to reduce or stop dues payment. Yet the district court in the instant case in essence approved Dean's self-help injunction. Under *Street* and *Allen*, it would have been appropriate for Dean to seek judicial relief by way of either (1) a rebate for political and ideological expenditures or (2) a narrowly drawn injunction prohibiting the use of a portion of his dues for political and ideological expenditures. [citations deleted] Under *Allen*, the union would have had the burden of proving the proportion of political to total union expenditures. [citation deleted] Dean did not pursue the proper avenue for redress of his

> grievance. The district court erred, therefore, when it granted summary judgment in his favor.

708 F.2d at 488. This Court denied Dean's petition for writ for certiorari. 464 U.S. 995.

In the meantime, TWA did in fact reinstate Dean on May 26, 1982. In September, 1982, Dean bid for and was awarded flights in October, 1982, but Dean failed to appear for and perform his flight duties – because, as it turned out, Dean was incarcerated in a federal penitentiary serving a one year sentence. After investigation, TWA discharged Dean again effective December 8, 1982.[1] (*Dean II*, 924 F.2d at 812.)

On remand from *Dean I*, the district court awarded partial summary judgment that in the event Dean was to prevail on the merits (i.e., on liability) that any relief to be granted to Dean *in this action* would not include back pay after May 26, 1982 and would not include a second reinstatement – that the merits of Dean's second termination were not a part of this lawsuit. (*Dean II*, 924 F.2d at 812.)

The matter then proceeded to trial and the district court, *with the concurrence of all of the parties (including Dean who was represented by counsel)*, instructed the jury that they had to judge the liability of TWA and ALPA separately and independently:

> Although there is more than one defendant in this action, it does not follow that if one is liable, both are liable. Each defendant is entitled to a fair consideration of the defendant's own

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[1] Dean's 1982 termination is still pending before the System Board of Adjustment.

> defense, and it is not to be prejudiced by the fact, if it should become a fact, that you find against another. Unless otherwise stated, all instructions given apply to the case against each defendant.

(Instruction No. 11) and also instructed the jury as to TWA:

> An employer may not be found liable for an employee's discharge pursuant to a union security agreement, unless the employer is aware, prior to the discharge of the employee, of facts that would lead it to believe that the discharge is for an improper purpose.

(Instruction No. 15).

The Verdict Form submitted to the jury and the jury's response as to TWA was:

> Question No. 5: If you found in favor of plaintiff against ALPA in Question No. 4, did TWA have knowledge of facts, prior to terminating Dean, that would lead it to believe that the request for discharge made by ALPA was unlawful?
>
> ANSWER: NO (Yes or No)
>
> Question No. 6: With respect to plaintiff's claim for wrongful termination against Defendant TWA, check one of the following:
>
> ___ We the jury find in favor of plaintiff Dean against defendant TWA.
>
> X We the jury find in favor of defendant TWA.

Judgment was entered July 19, 1985 and stated:

> JUDGMENT IS HEREBY ENTERED IN THE AMOUNT OF $110,000 IN FAVOR OF PLAINTIFF AND AGAINST THE DEFENDANT AIRLINE PILOTS ASSOCIATION AND JUDGMENT ENTERED IN FAVOR OF TRANS WORLD AIRLINES.

On appeal in *Dean II*, Dean (represented by new counsel) did not challenge the jury instructions or the jury verdict of no liability of TWA, and did not question the judgment in favor of TWA except indirectly through a demand that he be awarded a second reinstatement. The *Dean II* appeal, particularly as between Dean and ALPA, was complicated by this Court's intervening decision in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S. Ct. 1066 (1986) and whether it should be applied retroactively.

The Ninth Circuit in *Dean II*, 924 F. 2d 805 at 812 (9th Cir. 1991), affirmed the district court's ruling that Dean's remedies were limited to back pay up to May 26, 1982, and that Dean had no right to further reinstatement. As to TWA's position on remand, the Ninth Circuit held:

> TWA raises two independent issues on this appeal. TWA first argues Dean is not entitled to any relief against it for breach of the collective bargaining agreement. The jury found in favor of TWA on this claim. Dean has not alleged any errors that could implicate the accuracy of that verdict. There is, therefore, no reason to overturn the jury's verdict that TWA was not liable to Dean for breach of contract.

> TWA also argues that we should hold in its favor on the statutory and constitutional challenges. It claims that this action involves a dispute solely between Dean and ALPA. This argument was not briefed and not considered by the district judge. We will not consider the issue. TWA can make this argument to the district judge on remand.
>
> The district court's order limiting Dean's remedies is affirmed. The jury verdict in favor of TWA is affirmed. In all other respects, the judgment is reversed and remanded for further proceedings.

Dean II, 924 F.2d 805 at 812-813 (9th Cir. 1991).

Upon remand, shortly before the deadline for submitting dispositive motions, Dean's attorneys moved for permission to withdraw. Dean, although engaging in a vicious personal attack on his attorneys (including challenging their competence, honesty, ethics, integrity and emotional stability), asked the district court to require his attorneys to continue to provide him with free legal services. The district court denied the motion, with permission to renew it upon the conclusion of the summary judgment briefings.

Dean's attorneys then filed a motion for summary judgment on issues of liability against both ALPA and TWA; ALPA admitted liability, waived any rights to a new trial and moved to reinstate the jury verdict; and TWA moved for summary judgment of dismissal on the basis that it had no responsibility for ALPA's constitutional liabilities. Dean's attorneys also renewed their motion for permission to withdraw. All of the briefing on

these motions was completed and the matters submitted to Judge Rothstein by early January, 1992.

On January 31, 1992, TWA filed for bankruptcy protection under Chapter 11. Notice of the bankruptcy filing was entered by the district court clerk on February 7, 1992.

Judge Rothstein, by an Order dated February 4, 1992 and entered by the clerk on February 7, 1992,[2] ruled on the motions with the following results:

> 1. Judgment was entered against ALPA for the full amount of Dean's damages as determined by the prior jury verdict;
>
> 2. TWA was dismissed; and
>
> 3. Dean's attorneys were granted permission to withdraw.

Dean appealed from that Order to the Ninth Circuit, which resulted in the opinion which Dean now seeks to have this Court review.

The district court subsequently ruled on a number of motions **brought by Dean** and subsequently entered a supplemental judgment against ALPA imposing prejudgment interest on the amount of Dean's damages from the date of the prior jury verdict.

ALPA promptly paid both judgments against it in full by paying the monies[3] into the court and starting an

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[2] "The parties tell us that the court was not aware of the bankruptcy filing when it issued its order." *Dean III*, 72 F.3d 754 at 755 (9th Cir. 1995)

[3] $143,723.43.

interpleader action between Dean and the Internal Revenue Service. *Air Line Pilots Association v. Dean and United States*, 1993 WL 102852 (W.D. Washington, C92-513R). The Internal Revenue Service was awarded the funds[4] in that interpleader action and Dean appealed that judgment to the Ninth Circuit Court of Appeals, which subsequently dismissed that appeal. *Air Line Pilots Association v. Dean and United States*, 9th Circuit No. 93-35461 (Order dated August 17, 1994).

Dean unsuccessfully sought to commence this litigation all over again before the bankruptcy court, as though no rulings had ever been made or judgments entered or affirmed in this litigation. Instead, by Order dated July 26, 1994, the bankruptcy court lifted all injunctive or stay restrictions relating to this litigation. (A12-A13, Appendix to Petition)

After July 26, 1994, the appeal proceeded before the Ninth Circuit.

The circuits arguably do not agree on the circumstances under which post-filing dismissal of an action against a debtor in bankruptcy is an impermissible "continuance" which violates the automatic stay of 11 U.S.C. § 362(a)(1), although there are very few decisions discussing the issue. *Dennis v. A.H. Robbins Co.*, 860 F.2d 871, 872 (8th Cir. 1988) (per curiam); *Pope v. Manville Forest Prod. Corp.*, 778 F.2d 238 (5th Cir. 1985). The Ninth Circuit had previously ruled that such a dismissal could be permissible in some limited circumstances as long as it was

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[4] The IRS lien was and is significantly in excess of the amount of the judgment.

"consistent with the purpose of the statute." *Independent Union of Flight Attendants v. Pan American World Airways, Inc.*, 966 F.2d 457, 459 (9th Cir. 1992).

Dean raised no issue as to the merits of TWA's dismissal. As to TWA, the only issue tendered to the Ninth Circuit was whether or not the dismissal of TWA under these circumstances was an impermissible continuation. In resolving the issue, the Ninth Circuit **adopted the position urged by Dean** and held that under the circumstances the dismissal was an impermissible continuation and reversed the summary judgment dismissing TWA. (*Dean III*, 72 F.3d at 755-757; A5-A9, Appendix to Petition). No issue is, or could be, raised in Dean's Petition as to this ruling of the Ninth Circuit - the only one as to which there may arguably be some conflict between the circuits.

Dean also raised no issue as to the merits of the judgment entered in his favor against ALPA or the order permitting his attorneys to withdraw. Dean's position was that if the Ninth Circuit reversed the TWA dismissal, that this should retroactively require a FRCP 54(b) certification for the ALPA judgment and the Order permitting withdrawal, and he requested a ruling that the district court violated the stay as to those matters without having entered such a FRCP 54(b) certification.[5] The Ninth Circuit ruled:

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[5] Dean has steadfastly simply refused to acknowledge that the dispute between himself and his attorneys was a collateral matter outside any of the claims in the lawsuit and which did not relate to or involve TWA. The order permitting withdrawal was therefore a final judgment under the Collateral Judgment Rule without regard to any arguments concerning FRCP 54(b) or the stay as to TWA.

> We affirm the other portions of the district court's judgment, in which the court reinstated a judgment against ALPA and allowed Dean's lawyers to withdraw from the case. Dean argues these actions violated the stay. They did not. *United States v. Dos Cabezas Corp.*, 995 F.2d 1486, 1491 (9th Cir. 1993) ("Ordinarily, . . . unless the assets of the bankrupt estate are at stake, the automatic stay does not extend to actions against parties other than the debtor, such as codebtors and sureties.")(citations omitted; listing authorities).

Dean III, 72 F.3d at 755, n. 1; A-5, n. 1.

Cutting through the confusion and excessive verbiage of the Petition, the *entire* crux of Dean's position is that because the Ninth Circuit reversed the dismissal of TWA (as Dean requested) it therefore lost jurisdiction to affirm: the judgment against the non-debtor defendant, ALPA; and the collateral order permitting Dean's attorneys to withdraw – neither of which were subject to any substantive challenge by Dean on the merits.

ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TWA's filing for bankruptcy protection, except for the affects of the automatic stay upon claims against TWA itself, would not effect the district court's continuing jurisdiction over the action.[6] *David v. Hooker, Ltd.*, 560 F.2d 412, 418 (9th Cir. 1977) (automatic stay merely suspends those proceedings to which it applies and does not divest

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[6] There was no attempt to remove this litigation to the bankruptcy court.

the court of jurisdiction); *Donald F. Duncan, Inc. v. Royal Tops Manufacturing Co.*, 381 F.2d 879, 882 (7th Cir. 1967) ("bankruptcy does not divest other courts of jurisdiction over lawsuits involving the bankrupt which are pending at the time the bankruptcy is filed"). We are unaware of any conflict among authorities on that principle.

The automatic stay normally has no affect on non-debtors or proceedings against non-debtors. *United States v. Dos Cabezas Corp.*, 995 F.2d 1486, 1491 (9th Cir. 1993) (unless estate assets are at stake, the automatic stay does not ordinarily extend to action against parties other than the debtor); *Fortier v. Dona Anna Plaza Partners*, 747 F.2d 1324, 1329 (10th Cir. 1984):

> . . . Peterson assumes that an automatic stay under 11 U.S.C. § 362 stays litigation as to co-defendants of the bankrupt. However, the Courts of Appeals have uniformly rejected such an interpretation of the automatic stay provisions of the Bankruptcy Act.

We are unaware of any conflict among the authorities on that principle. Furthermore, we have been unable to find any case where a party has attempted to extend the automatic stay to a purely collateral dispute between a non-debtor party and its counsel and are unable to conceive of any logical basis arguably supporting such an extension.

Where there is a multi-party or multi-claim case and there is a dismissal of a party or claim as a part of a disposition of the entire litigation on the merits, the reversal of that dismissal on appeal does not retroactively make the determination of the other issues non-final so as to deprive the appellate court of jurisdiction. *New Castle*

County v. Hartford Acc. and Indem. Co., 933 F.2d 1162, 1180 (3rd Cir. 1991). There is no reason for a different result here. The Ninth Circuit, in resolving an open issue (on which there is disagreement among the circuits), adopted the position urged by Dean and reversed the dismissal of TWA on the basis that under the circumstances it was an impermissible "continuation." That did not, and should not, deprive the Ninth Circuit of jurisdiction to affirm the district court's other rulings.

A ruling that the Ninth Circuit, by reversing the dismissal of TWA, lost jurisdiction to consider all other aspects of the case would also be inconsistent with other established standards governing review.

> Ordinarily a judgment on fewer than all claims in an action does not terminate that action and thus, is not appealable. *Lockwood v. Wolf Corp.*, 629 F.2d 603, 608 (9th Cir. 1980). An exception exists where "the district court obviously was not trying to adjudicate fewer than all of the pleaded claims." Id. at 608.

Perkins-Elmer Corp. v. Computervision Corp., 680 F.2d 669, 670 (9th Cir. 1982), *cert. denied*, 105 U.S. 187, 460 S. Ct. 857. *See also Westcott v. Impresas Armadoras, S.A. Panama*, 564 F.2d 875, 880-881 (9th Cir. 1977) (doctrine of practical finality).

CONCLUSION

This case is now entering its nineteenth year. Dean's interest is not in the resolution of the litigation but in its continuance – it is his "life."

Dean was awarded his full damages under his claim[7], as determined by a jury, plus pre-judgment interest from the date of the verdict to the date of the judgments against ALPA. Those judgments have been affirmed by the Ninth Circuit.

ALPA has in fact paid those judgments in full, including all post-judgment interest. The proceeds, however, were seized by the Internal Revenue Service under a tax lien against Dean – as the IRS would seize any other proceeds.

There is nothing under Supreme Court Rule 10 to justify the granting of certiorari.

The district court should simply be permitted on remand to take the formal procedural and administrative steps necessary to bring this litigation to a formal closure.

The Petition should be denied.

Dated August 8, 1996.

Respectfully submitted,

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[7] Dean had only *one* claim in this litigation for which he asserted both ALPA and TWA should be liable. Once that claim had been determined, judgment entered against ALPA and the judgment paid by ALPA, there can be no basis for any further or additional claims or requests for relief by Dean against anyone in this litigation.